



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG584

Request for Public Comment Regarding an Administrative Law Judge’s Recommended Decision on a Proposed Waiver and Regulations Governing the Taking of Marine Mammals

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; request for comments.

SUMMARY: NMFS has proposed to issue a waiver and regulations under the Marine Mammal Protection Act (MMPA) to allow the Makah Indian Tribe to take a limited number of Eastern North Pacific (ENP) gray whales for ceremonial and subsistence purposes. A hearing to consider the proposed waiver and regulations took place on November 14–21, 2019, in Seattle, Washington before Administrative Law Judge George J. Jordan. On September 23, 2021, Judge Jordan transmitted his recommended decision to NMFS along with the hearing transcript and other required documentation. As required by MMPA regulations, NMFS now requests public comment on the Judge’s recommended decision.

DATES: Comments must be submitted in writing by *[insert date 20 days after publication in the Federal Register]*.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2019–0037, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to www.regulations.gov/docket?D=NOAA-NMFS-2019-0037, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.

• *Mail:* Attn: Grace Ferrara, NMFS West Coast Region, 7600 Sand Point Way NE, Seattle, WA 98115. Include the identifier “NOAA– NMFS–2019–0037” in the comments.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (*e.g.*, name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Jaclyn Taylor, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910; jaclyn.taylor@noaa.gov.

SUPPLEMENTARY INFORMATION: On February 14, 2005, NMFS received a request from the Makah Indian Tribe for a waiver of the MMPA moratorium on the take of marine mammals to allow for take of ENP gray whales (*Eschrichtius robustus*). The Tribe requested that NMFS authorize a tribal hunt for ENP gray whales in the coastal portion of the Tribe’s usual and accustomed fishing area for ceremonial and subsistence purposes and the making and sale of handicrafts. The MMPA imposes a general moratorium on the taking of marine mammals but authorizes the Secretary of Commerce to waive the moratorium and issue regulations governing the take if certain statutory criteria are met.

On April 5, 2019, NMFS published a Notice of Hearing and the associated proposed regulations in the **Federal Register** (84 FR 13639 and 84 FR 13604). Pursuant to an interagency agreement, a Coast Guard Administrative Law Judge was assigned to conduct the hearing and issue a recommended decision in this matter under the procedures set forth at 50 CFR part 228.

On November 14, 2019, Judge George J. Jordan (the presiding officer) commenced the hearing in this matter, which took place over 6 days. Six parties participated in the hearing,

including NMFS. The hearing was publicly conducted and reported verbatim by an official reporter. All filings associated with the hearing, including a full transcript of the hearing, have been made available for public viewing and inspection at

<https://www.uscg.mil/Resources/Administrative-Law-Judges/Decisions/ALJ-Decisions-2016/NOAA-Formal-Rulemaking-Makah-Tribe/>. Information pertaining to this hearing is also available at the NMFS website: *<https://www.fisheries.noaa.gov/action/formal-rulemaking-proposed-mmpa-waiver-and-hunt-regulations-governing-gray-whale-hunts-makah>*.

Consistent with the regulations governing this proceeding, at the close of the hearing Judge Jordan established a public comment period on the proposed waiver and regulations, including the opportunity to submit proposed findings and conclusions and written arguments and briefs. NMFS published notice of this public comment period in the **Federal Register** on January 29, 2020 (85 FR 5196). 50 CFR 228.19(b). That comment period ended on March 16, 2020 and the comments submitted are posted at the Federal e-Rulemaking Portal at *www.regulations.gov/docket?D=NOAA-NMFS-2019-0037*.

On September 23, 2021, the presiding officer transmitted his recommended decision to the NMFS Assistant Administrator for Fisheries, including (1) a statement containing a description of the history of the proceedings; (2) findings on the issues of fact with the reasons therefor; and (3) rulings on issues of law. The recommended decision is also posted on the NMFS website: *<https://www.fisheries.noaa.gov/action/formal-rulemaking-proposed-mmpa-waiver-and-hunt-regulations-governing-gray-whale-hunts-makah>*.

As required by our regulations at 50 CFR 228.20(c)-(d), NMFS provided copies of the presiding officer's recommended decision to the parties to the hearing and now announces a 20-day period for the parties and other interested persons to submit written comments on the presiding officer's recommended decision. Please note that the recommended decision is being made available for copying and review online only due to the ongoing COVID-19 pandemic. After considering these comments, the Assistant Administrator will issue a final decision on the

proposed waiver and regulations. That decision may affirm, modify, or set aside, in whole or in part, the recommended findings, conclusions, and decision of the presiding officer. The Assistant Administrator may also remand the hearing record to the presiding officer for a fuller development of the record. 50 CFR 228.21.

Authority: 16 U.S.C. 1371 *et seq.*

Dated: September 24, 2021.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

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